No. _____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARDO RODRIGUEZ, ET AL.,

Petitioners,

—v.—

DRAMESE FAIR, A Minor, by and through his mother and next friend, Sandra Foy,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a police officer be denied immediate appellate review and reversal of a denial of summary judgment on the basis of qualified immunity where the undisputed facts fail to support a claim of violation of clearly established law (i.e., legal sufficiency) but the Trial Judge claims to have found material facts in dispute as to whether the police officer acted reasonably in the circumstances (i.e., "evidence sufficiency")?

2. Is the law clearly established that an eleven year old juvenile lawfully arrested for a crime of violence with a dangerous instrument may not be routinely handcuffed?

3. Is the law clearly established that a police officer who has lawfully arrested an eleven year old juvenile for a crime of violence with a dangerous instrument must handcuff the suspect immediately or forego the discretion to handcuff and await changed circumstances before again having the right to handcuff the arrestee?

4. Should handcuffing vel non (i.e., without injury or aggravation of a known preexisting condition) ever be considered within the context of an excessive force claim. as opposed to a claim of an unlawful detention?

PARTIES TO PROCEEDINGS BELOW

Plaintiff-Respondent Dramese Fair, and his mother and next friend Sandra Foy.

New Haven Police Officer Richardo Rodriguez, and

New Haven Police Officer John Velleca, Petitioners

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term. 1997

RICHARDO RODRIGUEZ, ET AL.
Petitioners

vs.

DRAMESE FAIR, A Minor, by and through
his mother and next friend, Sandra Foy
Respondent

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ORDER BELOW

The petition challenges an Order of the Court of Appeals for the Second Circuit filed November 25, 1997, dismissing for lack of jurisdiction an appeal from a denial of summary judgment on grounds of qualified immunity, refusing to review the conclusion of the Trial Court that material facts were in dispute and precluded a ruling on the basis of qualified immunity. The initial ruling of the Trial Judge was a Margin Order, denying Motion in Limine treated by the Court as a motion for summary judgment, dated January 30, 1997. The Trial Court's second ruling was a Memorandum Endorsement Ruling on Defendants' Motion for Reconsideration, dated February 6, 1997.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the following:

Fourth Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States, Section 1.

Connecticut General Statutes, Sec. 53a-3(7).

Connecticut General Statutes, Sec. 53a-24.

Connecticut General Statutes, Sec. 53a-26.

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Connecticut General Statutes, Sec. 53a-64(a), Reckless Endangerment in the Second Degree.

Connecticut General Statutes, Section 53a-181(a), Breach of Peace.

Connecticut General Statutes, Sec. 53a-182(a), Disorderly Conduct.

STATEMENT OF THE CASE

New Haven Police Officer Richardo Rodriguez was on patrol when he was "dispatched to the front desk at the police department" where a the mother of a juvenile girl lodged a complaint that "her daughter was struck by Sandra Foy, punched, and was also hit by her son with a stick after an altercation between her daughter and Sandra Foy's daughter and a bunch of other youths." [May 22, 1994, Deposition of Richardo Rodriguez.]

Officer Rodriguez radioed Officer John Velleca to meet him and each drove to the vicinity of Church Street South, together with the young female victim of the alleged assault. [May 22, 1994, Deposition of Richardo Rodriguez; March 22, 1994, Deposition of Dramese Fair.]

As the cars approached the young female victim identified Dramese Fair as the person who had hit her with a stick. [May 22, 1994, Deposition of Richardo Rodriguez.]

When the New Haven Police Officers approached him Dramese Fair was outside "on the porch" of his home.

At the time Dramese Fair, then eleven years old, was "hitting the railing" with a stick about two feet long and an inch and a half round. [March 22, 1994, Deposition of Dramese Fair: May 22, 1994, Deposition of Richardo Rodriguez.]

Officer Rodriguez "came up the stairs" and asked Dramese Fair "Do you know what we are here for?" and Dramese Fair responded "Yeah, I hit her with the stick." [March 22, 1994, Deposition of Dramese Fair: May 22, 1994, Deposition of Richardo Rodriguez.]

Officer Rodriguez asked Mr. Fair where his mother was; Dramese Fair replied "I don't know." The officer asked Mr. Fair his name to which he answered "I don't know." [May 22, 1994, Deposition of Richardo Rodriguez.]

According to Dramese Fair the officer asked "Who is responsible for you?" and Dramese Fair responded "I don't know." [March 22, 1994, Deposition of Dramese Fair.]

Officer Rodriguez then took the stick from Dramese Fair and the youth was placed in the rear of Officer Rodriguez's police car, after the victim of the alleged assault

had been transferred by Officer Velleca to the latter's police car. [May 22, 1994, Deposition of Richardo Rodriguez.]

Officer Rodriguez then went to the door where Dramese Fair had been standing and knocked. A woman identified as Tracey Daniels identified the young juvenile male as "Dramese." Tracey Daniels told the police that "Dramese's" mother was not home and had gone to church up the street on Liberty Street. [May 22, 1994, Deposition of Richardo Rodriguez.] At this point Dramese Fair had been in the police car seconds to a few minutes. [May 22, 1994, Deposition of Richardo Rodriguez; March 22, 1994, Deposition of Dramese Fair.]

Officer Velleca, who believed that Dramese Fair had been arrested, observed several other youths near the car and had concern that Dramese Fair, perhaps in concert with the others, might flee at a time when the only name they had was "Dramese" and there was no complete or certain identification of Dramese Fair. Officer Velleca also observed Dramese Fair going into a police officer's briefcase

in the car. Officer Velleca handcuffed Dramese Fair. It is New Haven Police Department policy and training to treat juveniles and adults essentially the same when it comes to handcuffing where there has been an accusation of an assault. [May 22, 1994, Deposition of Richardo Rodriguez; May 22. 1994 Deposition of John Velleca.]

The police cars were then driven about three or four minutes and a few blocks to the church at Liberty Street. Officer Velleca went to the church door and got Sandra Foy who identified Mr. Fair as her son, at which time the handcuffs were removed, Mr. Fair having been handcuffed at most five or six minutes. [March 22, 1994, Deposition of Dramese Fair; May 22, 1994, Deposition of Richardo Rodriguez; May 2, 1994 Deposition of John Velleca.]

There was no demonstrable injury or claim of injury as a consequence of the handcuffing, there was no claim of a preexisting medical condition that was aggravated by the handcuffing, and there was no claim that Mr. Fair had alerted the officers to any injury or to any preexisting medical

condition that was or might be aggravated by the handcuffing. The only claims are that the handcuffs were too tight, and that the plaintiff was emotionally upset by the handcuffing, and the officers delayed the handcuffing even though Mr. Fair allegedly took no hostile or evasive action.

Ms. Foy and Dramese Fair were then driven to the police substation in the housing complex where Ms. Foy and Dramese Fair lived, and Ms. Foy was charged with Breach of the Peace and Dramese Fair was referred to Juvenile authorities on a charge of Breach of the Peace with possible mediation contemplated. [March 22, 1994, Deposition of Dramese Fair; May 22, 1994, Deposition of Richardo Rodriguez; May 2, 1994 Deposition of John Velleca.]

The Complaint in this lawsuit did not allege excessive force. Rather, it alleged an unlawful investigative stop and detention that rose to the level of what the plaintiff claimed was an unjustified arrest. When the defense pointed out that the Court of Appeals for the Second Circuit had addressed the issue of handcuffing vel non in the context of

an excessive force claim plaintiff adopted the excessive force theory.

> The defense moved for summary judgment.
>
> . . . The inferences drawn from the facts in the deposition excerpts submitted to the Court, viewed most favorably to the plaintiff, could demonstrate that plaintiff took no evasive or hostile actions, and that no circumstances changed between the time plaintiff was placed in the police vehicle uncuffed and the time he was handcuffed.
>
> Thus, a factual determination is necessary at trial to determine the totality of the circumstances under which the objective reasonableness of the defendant police officers' actions in handcuffing plaintiff must be assessed.
>
> . . . .

[Margin Order, denying Motion in Limine treated by the Court as a motion for summary judgment, dated January 30, 1997, Appendix, page 7A.]

The defense timely moved for reconsideration. The Trial Judge clarified that she found for the defense on all issues (alleged illegal stock, detention, arrest) except excessive force due to handcuffing.

The Trial Judge asserted that

> . . . [M]aterial facts here are disputed: whether the underlying offense was violent or not, plaintiff's conduct prior to, during and after being placed into the police cruiser, the existence of any fight or flight manifestation by plaintiff at anytime, or any attempted escape assistance by other children outside the cruiser and plaintiff's conduct while inside the cruiser claimed to require the placement of handcuffs on him.
>
> . . .

> . . . [P]laintiff's pre-adolescent age, small size, claimed lack of sophistication and guilelessness, and increased vulnerability to emotional trauma by virtue of his youth, are all factors which must be considered as part of the totality of the circumstances facing the officers at the time.

[Memorandum Endorsement Ruling on Defendants' Motion for Reconsideration, filed February 6, 1997, Appendix, pages 11A, 13A.]

The defense then appealed, relying solely on the theory that qualified immunity is appropriate where the undisputed facts fail to support a claim of violation of "clearly established law." In fact, the "clearly established law" definitively supports the handcuffing of Mr. Fair.

The Court of Appeals dismissed for lack of jurisdiction because of the alleged genuine issues of material fact.

REASONS FOR GRANTING THE WRIT

1. A police officer may not be denied immediate appellate review and reversal of a denial of summary judgment on the basis of qualified immunity where the undisputed facts fail to support a claim of violation of "clearly established law" (i.e., "legal sufficiency") but the Trial Judge claims to have found material facts in dispute as to whether the police officer acted reasonably in the circumstances (i.e., "evidence sufficiency").

The rulings from which we appeal differ from other federal courts of appeals with respect to this issue.

Qualified immunity shields government officials who reasonably but mistakenly conclude that their conduct is lawful, i.e., (i) if the law was not clear at the time he or she acts, or (ii) unless it can be said that no reasonable police officer in the defendant officer's position would have done what the officer did. Anderson vs. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987); Harlow vs. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73

L.Ed.2d 396, 410 (1982); Lennon vs. Miller, 66 F.3d 416 (2d Cir. 1995).

Only a lack of reasonableness as to both factors permits denial of qualified immunity on a motion for summary judgment.

Qualified immunity is not merely a defense to liability, it is an immunity from suit. Hunter vs. Bryant, 502 U.S. 224, 112 S.Ct. 534, 536, 116 L.Ed.2d 589, 595 (1991) (citation omitted).

Only if there are disputed issues of material fact which might affect the Court's determination of a claim of qualified immunity are special factual interrogatories to be submitted to the jury, with the Court rendering its decision after. Hunter vs. Bryant, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589, 595 (1991); Lennon vs. Miller, 66 F.3d 416 (2d Cir. 1995); Cartier vs. Lussier, 955 F.2d 841, 845-46 (2d Cir. 1992).

This Court also distriguished between "evidence sufficiency" and "legal sufficiency." No "final decision" reviewable on appeal exists from "District Court's determination that the summary judgment record . . . raised a genuine issue of fact concerning . . . [the accused's] involvement in the alleged . . . [wrongdoing]." Johnson vs. Jones, 515 U.S. 304, 313, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238, 246-247 (emphasis added).

But Johnson also reaffirmed the right to immediate appeal of a determination whether or not the alleged facts, if proven, would have violated "clearly established law." Id, 515 U.S. at 318, 115 S.Ct. at 2159, 132 L.Ed.2d at 250, analyzing Mitchell vs. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411, 427 (1985); see also, Siegert vs. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277, 287 (1991).

> . . .[W]hether there is jurisdiction over the appeal . . . must be determined by focusing upon the category of order appealed from,

> rather than upon the strength of the grounds for reversing the order. "Appeal rights cannot depend on the facts of a particular case." . . . [A]n order denying qualified immunity, to the extent it turns on an "issue of law" . . . is immediately appealable.

Behrens vs. Pelletier, 516 U.S. 299, 311, 116 S.Ct. 834, 841, 133 L.Ed.2d 773, 786 (1996).

> Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." . . . That question of law, like the generality of such questions, must be resolved de novo on appeal. . . .

Elder vs. Holloway, et al., 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344, 351 (1994) (citations omitted).

In the instant case we stated repeatedly, orally at argument and in our pleadings, that we realize for the purposes of our motion we must assume the truthfulness of the allegations of the plaintiff -- his age of eleven at the time of the incident, his alleged small size, his claimed lack of sophistication and guilelessness and claimed increased vulnerability to emotional trauma by virtue of his youth, and, as the Trial Judge summarized in her initial Margin Order, that "plaintiff took no evasive or hostile actions, and that no circumstances changed between the time plaintiff was placed in the police vehicle uncuffed and the time he was handcuffed," and we must assume the accuracy of his attorneys' denial of the officers' assertions that his friends were within a distance of the police car so as to be able to assist in an escape attempt, he was fidgeting in the car and opened a police briefcase, the handcuffs were not too tight (and in fact were loose given Mr. Fair's youth).

Our argument has consistently been and continues to be that the question is whether even assuming the truth of the

plaintiff's allegations the law permitted the officers to handcuff young Mr. Fair.

Thus, in the instant case both the District Court and the Second Circuit panel necessarily concluded that the law as to those allegations, if proven to be true, was "clearly established" but failed to make the distinction recognized in Johnson and Behrens. In so doing the Second Circuit departed from its own prior rulings in Genas vs. State of New York Department of Correctional Services, et al., 75 F.3d 825 (2d Cir. 1996); Rodriguez, et al. vs. Phillips, et al., 66 F.3d 470 (2d Cir. 1995).

Contrary to the Second Circuit, the Fourth Circuit Court of Appeals has properly applied the distinction.

> An articulation of this distinction is rather straightforward, but an application of it may prove to be more difficult . . . [D]ifficulty in assessing the threshold jurisdictional issue will remain becuase the determination of whether the law was clearly

established at the requisite level of particularity is an especially fact-bound legal inquiry. . . . Moreover. all denials of summary judgment, by definition, involve a determination that the evidence is disputed sufficiently to raise a genuine issue of material fact for trial. . . . And. inherent in every determination that a government official is not entitled to qualified immunity is the legal determination that viewed in the light most favorable to the nonmoving party, the official's conduct violated a clearly established constitutional or statutory right. . . Accordingly, each decision of a district court denying a governmental official's request for summary judgment based upon qualified immunity will encompass a determination that the facts are sufficiently controverted to warrant a trial and that the legal right

purportedly violated was clearly established. Obviously, if a determination by a district court that genuine issues of material fact warrant trial were sufficient to prevent us from exercising jurisdiction over an appeal from an order rejecting a qualified immunity defense, we would never have jurisdiction over such appeals--a result plainly at odds with Mitchell and its progeny. . . .

. . . In other words, we possess no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the events actually occurred, but we have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them.

Winfield vs. Bass, 106 F.3d 525, 529-30, (4th cir. 1997) (emphasis added).[1]

The consequence of the rulings of the Trial Judge and the Second Circuit is that a jury issue would be presented on a claim of excessive force by the mere claim that the arrestee is a juvenile and emotionally upset, the handcuffs were too tight, and the officers delayed a few minutes and until after placing the youth in the police car before handcuffing him.

---

[1] Same: Diaz, et al. vs. Martinez, et al., 112 F.3d 1, 2-5 (1st Cir. 1997); Pro vs. Donatucci, 81 F.3d 1283 (3rd Cir. 1996) (consistent with Johnson and Behrens, although it does not expressly cite those cases; other Third Circuit cases do cite them but are not on point); Coleman vs. Houston Independent School District, et al., 113 F.3d 528, 531 (5th Cir. 1997); Turner vs. Scott, 119 F.3d 425, 427-28 (6th Cir. 1997); Bakalis vs. Golembeski, et al., 125 F.3d 576, 578-79 (7th Cir. 1997); Prosser vs. Ross, 70 F.3d 1005 (8th Cir. 1995); Newell vs. Sauser, 79 F.3d 115 (9th Cir. 1996); Foote vs. Spiegel, et al., 118 F.3d 1416, 1422 (10th Cir. 1997); Johnson vs. City of Fort Lauderdale, Florida, et al., 126 F.3d 1372, 1378 (11th Cir. 1997); Vista Community Services vs. Dean, et al., 107 F.3d 840, 843-44 (11th Cir. 1997); Cooper vs. Smith, 89 F.3d 761 (11th Cir. 1996); Crawford-El vs. Britton, 93 F.3d 813, 823-24 (D.C. Cir. 1996) (en banc), writ of certiorari granted on other grounds, ___ U.S. ___, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997).

If the law is now to be changed the police officers are entitled to know that. Unless we have a clear appellate determination that the law is in fact changed every New Haven Police Officer must henceforth operate on the assumption that the Trial Judge is correct even if we win the instant case at trial without having appellate review of our qualified immunity defense. In otherwords, even if the defense wins the instant case at trial we will have foregone that appellate ruling unless this Court rules on the issue now, before such trial.

2. There is no clearly established law that an eleven year old juvenile lawfully arrested for a crime of violence with a dangerous instrument may not be routinely handcuffed indeed, the law is to the contrary.

Qualified immunity has been recognized as available in response to claims of excessive force. Lennon vs. Miller, 66 F.3d 416 (2d Cir. 1995), and cases cited therein.

As the Trial Judge has ruled, there was objective probable cause to arrest Dramese Fair for the misdemeanor

crime of Breach of the Peace, Connecticut General Statutes, Section 53a-181(a)(1) and (2). [Appendix, at page 4A.]

Young Mr. Fair could also have been charged with the criminal misdemeanors of Disorderly Conduct, Connecticut General Statutes, Section 182(a), Assault in the Third Degree, Connecticut General Statutes, Section 53a-61, Assault in the Second Degree with a "dangerous instrument," Connecticut General Statutes, Section 53a-60 and Section 53a-3(7), and Reckless Endangerment in the Second Degree, Connecticut General Statutes, Section 53a-64. [Appendix, at pages 2A-5A.]

A stick could constitute a "dangerous instrument" consistent with Connecticut General Statutes, Section 53a-3(7). State vs. Jones, 173 Conn. 91, 376 A.2d 1077 (1977)(hockey stick).

The Trial Judge agreed that there was adequate "probable cause" to arrest young Mr. Fair before he was placed in the police car and a fortiori before he was handcuffed.

The "maximum intrusion" of taking a person into custody and handcuffing is within the discretion of the officer.

> . . . Where articulable grounds for probable cause are shown, the maximum intrusion of a custodial arrest is permissible. See Sibron v. New York, . . ., 392 U.S. at 66, 88 S.Ct. 1889 (discussing Peters' appeal, No. 74). . . .

United States vs. Price, 599 F.2d 494, 498-99 (2d Cir.1979) (citing Sibron v. New York, 392 U.S. 40, 66 (1968) (discussing Peters' appeal) (emphasis added).

Neither the plaintiff, the Trial Judge nor the Court of Appeals cited any "clearly established law," or, indeed, any authority for the proposition that a juvenile arrested for assaulting another person may not be handcuffed because he or she is eleven years old or younger, or that the alleged tightness of handcuffs will support a claim of excessive force in the absence of demonstrable injury or knowledge of a

prior medical condition which is known to the officer and which is aggravated by the handcuffing.

In Soares vs. State of Connecticut, 8 F.3d 917 (2d Cir. 1993), a panel of the Court of Appeals for the Second Circuit held that law enforcement officers were entitled to qualified immunity for handcuffing an individual based on an arrest for violation of a Connecticut Department of Environmental Protection reporting regulation.

In Bergren vs. City of Milwaukee, 811 F.2d 1139 (7th Cir. 1987), originally brought to our attention by Respondent's counsel, the Court found no violation of an eleven year old plaintiff's rights when he was arrested on circumstantial evidence that he had assaulted a two-year old, police transported him to a police station and questioned him without an adult present for approximately forty-five minutes, further detained him in a cell for more time, and handcuffed him and took him to a juvenile detention center where he was again detained until a morning hearing.

Even pretrial incarceration of a juvenile for up to 17 days does not violate his due process rights provided the confinement is for legitimate purposes other than punishment and the period is not excessive in light of the government's legitimate interests. Schall vs. Martin, 467 U.S. 253, 269, 104 S.Ct. 2403, 81 L.Ed.2d 207, 220 (1984).

Qualified immunity is proper even where there is an allegation that handcuffs were too tight and an allegation that the arrestee had complained of tightness to the officer, but there is no objective evidence of any permanent injury. Nemeckay vs. Rule, 894 F.Supp. 310, 313 n. 1, 317-18 (E.D.Mich. 1995), and cases cited therein.

In contrast, according to the Sixth Circuit, "[a]n excessive use of force claim could be premised on . . . handcuffing . . . if . . . [the officer] knew that [the arrestee] had an injured arm and if he believed that she posed no threat to him." Walton vs. City of Southfield, et al., 995 F.2d 1331, 1342 (6th Cir. 1993) (bracketed portions added.)

> These principles are corollary to the limitation that
>
> . . . "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," . . . , violates the Fourth Amendment.

Graham vs. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443, 455-56 (1989)(citation omitted).

In fact, even if there were alternative means of physically controlling Mr. Fair a law enforcement officer is not limited to applying only the *most* reasonable of several reasonable alternatives. United States v. Sharpe, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 84 L.Ed.2d 605, 616 (1985).

3. There is no clearly established law that a police officer who has lawfully arrested an eleven year old juvenile for a crime of violence with a dangerous instrument must handcuff the suspect immediately or forego the discretion to handcuff and await changed circumstances before again having the right to handcuff the arrestee.

First, no one cited "clearly established law," or, indeed, any authority that an officer with probable cause to arrest must handcuff the suspect immediately or forego the discretion to handcuff and await changed circumstances before again having the right to handcuff the arrestee, whether or not the arrestee is a juvenile. In fact, Bergren vs. City of Milwaukee, supra, again originally brought to our attention by counsel for Respondent, clearly supports the delayed hancuffing in this case, as does Schall vs. Martin, supra.

Handcuffing is often simply a safety precaution to preclude unexpected flight, resistance, or violence.

Second, if the officer's actions are objectively reasonable they are legal, regardless of his subjective motivations.[2]

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[2] Officer Believed No Probable Cause: Florida vs. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Peters vs. New York, decided with Sibron vs. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Warren, vs. City of Lincoln, Nebraska, et al., 864 F.2d 1436, 1439-40 (8th Cir. 1989); Klinger vs. United States, 409 F.2d

Third, logic compels the conclusion that an officer need not handcuff an individual the moment he places that

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299, 305 (8th Cir. 1969); United States, ex rel. Senk vs. Brierley, 381 F. Supp. 447, 463 (M.D. Pa. 1974), aff'd, 511 F.2d 1396 (3d Cir.), cert denied, 423 U.S. 843, 96 S.Ct. 771, 46 L.Ed. 2d 63 (1975); United States vs. Day, 455 F.2d 454, 456 (3d Cir. 1972).

Officer Uncertain He Had Probable Cause: United States vs. Salinas-Calderon, 728 F.2d 1298, 1300-1301 (10th Cir. 1984);

Officer Charged Wrong Crime: Washington Mobilization Committee vs. Cullinane, 566 F.2d 107, 123, rehearing en banc denied (D.C. Cir. 1977); United States ex rel. LaBelle vs. LaVallee, 517 F.2d 750, 753-754 (2d Cir. 1975); Klinger vs. United States, 409 F.2d 299, 305 (8th Cir. 1969); Craig vs. Krzeminski, 764 F.Supp. 248, 250 (D.Conn.1991); Saffron vs. Wilson, et al., 481 F.Supp 228, 242 (U.S.D.C. 1979); United States vs. Carr, 445 F.Supp. 1383 (D.Conn. 1978).

Arrest Pretextual: Whren, et al. vs. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); Singer vs. Fulton County Sheriff, et al., 63 F.3d 110, 118-119 (2d Cir. 1995); United States vs. Scopo, 19 F.3d 777 (2d Cir.), cert. denied, sub nom. Scopo vs. United States, 513 U.S. 877, 115 S.Ct. 207, 130 L.Ed.2d 136 (1994).

individual under arrest or lose that discretion absent changed circumstances.

It is the taking into custody which definitively establishes the "bright line" authority to handcuff, whether the authority is exercised immediately or later or not at all.

4. Handcuffing vel non (i.e., without injury or aggravation of a known preexisting condition) should not be considered within the context of an excessive force claim, as opposed to a claim of an unlawful detention.

It is error of the Second Circuit Court of Appeals, in this case and in Soares vs. State of Connecticut, supra, to evaluate the issue of handcuffing vel non (i.e., without injury or aggravation of a known preexisting condition) in the context of an excessive force claim.

Whether handcuffing vel non is unconstitutional has relevance and is manageable only in the context of whether the detention is justified as either an investigative stop or an arrest. United States v. Sharpe, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 84 L.Ed.2d 605, 616 (1985).

Once an officer has probable cause to arrest there is no logic or manageable standard for determining whether or not the officer continues to have the right to handcuff in individual cases. Only the manner of handcuffing should potentially be at issue, and only where there is evidence of injury or aggravation of an allegedly known prior condition.

RESPECTFULLY SUBMITTED,

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Fax: (203) 946-7942
Fed. Bar No. ct07596

APPENDIX

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term. 1997

RICHARDO RODRIGUE, ET AL.
Petitioners

vs.

DRAMESE FAIR, A Minor. by and through
his mother and next friend, Sandra Foy
Respondent

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners rely on the following:

Fourth Amendment to the Constitution of the United States.

Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the Constitution of the United States.

Citizens rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes, Sec. 53a-3(7).

"Dangerous instrument" is defined as "any instrument, article or substance, which under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury. ...."

Connecticut General Statutes, Sec. 53a-24.

"... [t]he term crime comprises felonies and misdemeanors..."

Connecticut General Statutes, Sec. 53a-26.

A misdemeanor is "[a]n offense for which a person may be sentenced to a term of imprisonment of not more than one year...."

Connecticut General Statutes, Sec. 53a-60(a)(2).

A person is guilty of assault in the second degree when:

. . .

(2) with intent to cause physical injury to another person,

he causes such injury to such person or to a third person by

means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm. . . . ;

. . . .

Connecticut General Statutes, Sec. 53a-61(a), Assault in the Third Degree. A person is gulty of assault in the third degree when:

(1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

(2) he recklessly causes serious physical injury to another person; or

(3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

Connecticut General Statutes, Sec. 53a-64(a), Reckless Endangerment in the Second Degree. A is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a risk of physical injury to another person.

Connecticut General Statutes, Section 53a-181(a), Breach of Peace.

A person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or

(2) assaults or strikes another; . . . .

Connecticut General Statutes, Sec. 53a-182(a), Disorderly Conduct.

A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or

(2) by offensive or disorderly conduct, annoys or interferes with another person;. . . . .

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DRAMESE FAIR	: NO.3:94CV137 (JBA)
	:
VS.	:
	:
RICHARDO RODRIGUEZ. and	:
JOHN VELLECA	: NOVEMBER 13 1996

DEFENDANT'S MOTION IN LIMINE

Pursuant to discussion with the Court the defense submits this motion in limine, supported by the accompanying memorandum, in anticipation of our argument at the close of the plaintiff's case that the defense is entitled to a directed verdict.

If, after full briefing, the Court agrees with our analysis, we respectfully ask that the Court treat this as a motion for summary judgment, with the section on material facts in our memorandum as our Statement of Materials Facts Not in Dispute.

ORAL ARGUMENT IS REQUESTED

TESTIMONY IS NOT REQUIRED

Respectfully submitted,

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[The following was typed in the left margin]

01/30/97: Motion DENIED. The inferences drawn from the facts in the deposition excerpts submitted to the Court, viewed most favorably to the plaintiff, could demonstrate that plaintiff took no evasive or hostile actions, and that no circumstances changed between the time plaintiff was placed in the police vehicle uncuffed and the time he was handcuffed. Thus, a factual determination is necessary at trial to determine the totality of the circumstances under which the objective reasonableness of the defendant police officers' actions in handcuffing plaintiff must be assessed.

[The following was hand printed in the left margin:]

Trial to commence 3/11/97 @ 9:00 A.M.

[The following was typed in the left margin]

IT IS SO ORDERED. New Haven, Connecticut.

_____

Janet Bond Arterton, U.S.D.J.

FILED Jan 31 11:17 A.M. '97
U.S. District Court
New Haven, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DRAMESE FAIR	: NO.3:94CV137 (JBA)
	:
VS.	:
	:
RICHARDO RODRIGUEZ, and	:
JOHN VELLECA	: FEBRUARY , 1997

ENDORSEMENT RULING ON DEFENDANTS' MOTION FOR RECONSIDERATION [doc. #501]

Defendants' Motion in Limine was invited by the Court in a pretrial conference, long after the date had expired for a summary judgment motion, in order to eliminate waste of resources if undisputed facts showed plaintiff to have no cognizable 42 U.S.C. Sec. 1983 claim, or alternatively, to have pretrial argument on defendants' anticipated motion pursuant to Fed. R. Civ. P. 50(a), focusing both counsel and the Court on the evidentiary issues which would be tested by defendants' motion.

After a full review of the parties' submissions and oral argument, the Court concluded that the sharp dispute of

facts on which an assessment would be made as to the objective reasonableness of force used to determine the applicability of qualified immunity, required the commencement of trial and presentation of plaintiff's evidence. Thus, the Court denied defendants' Motion in Limine. Qualified immunity on the excessive force claim thus remains for further consideration on defendants' anticipated Rule 50(a) motion, following the close of Plaintiff's evidence.

The defendants' motion for reconsideration is granted in part to correct defendants' inaccurate and over-expansive interpretation of what the Court's ruling "seems to be." (Defs.' Mot. at 3).

By agreement of the parties, the Court applied summary judgment standards to this Motion in Limine. "Summary judgment on qualified immunity grounds may be granted if the court finds, viewing the evidence in the light most favorable to the plaintiffs and drawing all reasonable inferences in their favor, that 'no rational jury could fail to

conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.'" Doe v. Marsh, No. 96-7453, 1997 WL 31582 at *3 (2d Cir. Jan. 22, 1997) (quoting In re State Police Litigation, 88 F.3d 111, 123 (2d Cir. 1996). "In other words, if any reasonable trier of fact could find that the defendants' actions were objectively unreasonable, then the defendants are not entitled to summary judgment." Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995).

In contrast to Lennon, material facts here are disputed: whether the underlying offense was violent or not, plaintiff's conduct prior to, during and after being placed into the police cruiser, the existence of any fight or flight manifestation by plaintiff at anytime, or any attempted escape assistance by other children outside the cruiser and plaintiff's conduct while inside the cruiser claimed to require the placement of handcuffs on him.

Taking the inferenceas most favorable to plaintiff's version in deposition, he was a small, pajama-clad, shoeless twelve year-old boy, sitting on the porch of his home, who willingly gave police his stick on their request, which he admitted he had used to earlier hit Nadia, who made no effort to resist or flee from police at any time, and who sat in the cruiser, silent and hands together in his lap, crying after the police entered the cruiser and handcuffed him. While this version is strongly disputed by defendants, the Court concluded that a reasonable trier of fact could find that defendants' actions were objectively unreasonable. Lennon, 66 F.3d at 420. The force used by defendants under the totality of the circumstances posited by the plaintiff cannot be said to be objectively reasonable as a matter of law. Thus, plaintiff's claim of deprivation of his constitutional right to be free from excessive force must advance to trial.

The Second Circuit has declined to adopt a per se rule that the use of handcuffs in effecting an arrest is always reasonable. Soares v. Connecticut, 8 F.3d 917, 921 (2d Cir.

1993). Rather, in determining whether the force used to effect a particular seizure is reasonable, the Court must evaluate the particular circumstances of each case, deciding it on its "own facts." Id.

Notwithstanding plaintiff's concession at oral argument that had he been an adult at the time of the incident, defendants' conduct would not give rise to a 42 U.S.C. §1983 claim, the Court concludes that plaintiff's pre-adolescent age, small size, claimed lack of sophistication and guilessness, and increased vulnerability to emotional trauma by virtue of his youth, are all factors which must be considered as part of the totality of the circumstances facing the officers at the time.

Thus, whether it was reasonable for these officers [sic] to believe their actions did not violate plaintiff's clearly established rights depends here, as it did in Weyant v. Okst, 101 F.3d 845, 858 (2d Cir. 1996), "on whether one believes their version of the facts. That version is sharply disputed, and the matter of the officers' qualified immunity therefore

cannot be resolved as a matter of law." See also Posr v. Doherty, 944 F.2d 91, 96 (2nd Cir. 1991) (finding that whether officers reasonably believed that their use of force was not excessive was properly a jury issue).

While defendants' Motion for Reconsideration appears to link the existence of probable cause to arrest plaintiff [sic] to the legal justification for the use of force while plaintiff was detained in the cruiser, these two issues require [sic] separate analysis. Graham v. Connor, [sic] 490 U.S. 386 (1989), decided in the context of a directed verdict, makes no distinction between pre and post arrest excessive force claims holding that both are to be analyzed under the Fourth Amendment "objective reasonableness" standard. 490 U.S. at 395.

On this motion, defendants also renew their claim that in the absence of demonstrable injury to plaintiff they are entitled to qualified immunity. However, the record of the existence of plaintiff's injury is far from undisputed. Plaintiff claims he started to cry when handcuffed, and has

suffered resulting serious emotional trauma from that treatment which persists to the present in the form of uncontrolled fear of police officers. This, too, will be re-examined, but only after presentation of plaintiff's evidence at trial.

By plaintiff's Requests for Jury Instructions, plaintiff appears to have abandoned his Equal Protection and malicious prosecution claims for trial. Thus, defendants' argument requesting reconsideration in connection with these claims are moot.

Plaintiff's Requests for Jury Instructions, however, appear to press a false arrest claim for trial. Since false arrest remains a claim distinct from plaintiff's excessive force claim, the Court also grants defendants' Motion for Reconsideration to expand its Endorsement Ruling, and to grant defendants' Motion in Limine with respect to defendants' qualified immunity to false arrest liability.

There are two categories of seizures of the person implicating the protection of the Fourth Amendment. The

first is an investigative detention or Terry stop. See Terry v. Ohio, 392 U.S. 1, 13 (1968). An investigative detention employs the least intrusive means reasonably available to promptly verify or dispel the officer's suspicion, and can be supported by a reasonable suspicion, instead of probable cause. Florida v. Royer, 460 U.S. 491, 500 (1983); Posr, 944 F.2d at 98. With respect to the intrusiveness of a Terry stop, the court should examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. United States v. Sharpe, 470 U.S. 675, 686 (1985).

As the level of intrusiveness rises, however, an encounter between the police and a citizen becomes more properly categorized as an arrest--the second category of seizures of the person. Posr, 944 F.2d at 98. " 'If the totality of the circumstances indicates that an encounter has become too intrusive to be classified as an investigative detention, the encounter is a full-scale arrest, and the government must

establish that the arrest is supported by probable cause." Id. (citation omitted). There is no bright line rule differentiating an arrest from a detention supportable by less than probable cause. Royer, 460 U.S. at 506: Posr, 944 F.2d at 98.

Whether a seizure is an arrest or merely an investigatory detention, depends on the reasonableness of the level of intrusion under the totality of the circumstances. Posr, 944 F.2d at 98. Thus:

> "[W]hether an officer has exceeded the least intrusive means of dealing with a suspect and effected an arrest depends on the facts surrounding their encounter, and must be assessed in light of those facts. An arrest need not be formal; it may occur even if the formal words of arrest have not been spoken provided that the subject is restrained and his freedom of movement is restricted."

Id. Additionally, the issue of when an arrest takes place is factual. Id. at 99.

Plaintiff contends that Officer Rodriguez admitted in his deposition that he did not place plaintiff under arrest, and that he did not have probable cause for an arrest. Further, plaintiff alleges that defendants did not inform him that he had been arrested. Thus, rather than arresting him, plaintiff claims, the officers unreasonably detained him for the purposes of conducting an investigation.

Plaintiff's argument fails. First, a person may be arrested absent any formal placement under arrest, even if the formal words of arrest have not been spoken, provided that the person is restrained and his or her freedom of movement is restricted. Id. at 98. Thus, that the officers never "placed" plaintiff under arrest, or informed him whether he was under arrest, does not negate a finding under the totality of the circumstances that he was, in fact, arrested. Moreover, even crediting plaintiff's claim that Officer Rodriguez admitted that he did not have probable cause for arresting plaintiff, an officer's subjective intent as to the existence of probable cause is irrelevant to the objective determination of whether

probable cause exists. See Whren v. United States, 116 S.Ct. 1769, 1774 (1996) (holding "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") Ohio v. Robinette, 117 S.Ct. 417, 420 (1996) (same); United States v. Salinas- Calderon, 728 F.2d 1298, 1300 (10th Cir. 1984) (finding that where the objective probable cause test is met, it is unnecessary that the officer hold a subjective belief that he or she has a basis for making the arrest). Therefore, the Court must examine the totality of the circumstances in order to determine whether plaintiff's encounter with the defendants became too intrusive to be classified as an investigative detention, and is rather a full-sale arrest which must be supported by probable cause. Posr, 944 F.2d at 98.

Although at what point a permissible investigative detention ripens into an arrest is a question of fact, material facts relevant to this determination in this case are

undisputed. After the officers questioned plaintiff about their purpose for visiting his home, his name and the location of his mother, the defendant officers placed plaintiff in the back-seat of Officer Rodriguez's police cruiser, thus curtailing his movement while they questioned the adult occupants of plaintiff's home. The defendants further restrained plaintiff and restricted his freedom of movement when they handcuffed him inside the police cruiser. See Sibron v. New York, 392 U.S. 40, 67 (1967) (arrest occurred when officer seized suspect and curtailed his movement by grabbing his collar); U.S. v. Moreno, 897 F.2d 26, 31 (2d Cir. 1990) (arrest occurred when officer pushed suspect against the wall and told him not to move); United States v. Levy, 731 F.2d 997, 1000 (2d Cir. 1984) (arrest occurred where suspect was restrained and his freedom of movement restricted when officer ordered him to freeze and forced him to stand spread-eagled against a wall).

In light of the undisputed facts, the Court concludes that the officers exceeded the least intrusive means of dealing

with plaintiff for investigative purposes, thereby effecting his arrest. Thus, plaintiff's seizure was not an unreasonably intrusive Terry stop for which he may seek redress, but rather a full-scale arrest for which probable cause must be established. Posr, 944 F.2d at 98.

Moreover, the Court concludes on the undisputed facts, that no reasonable jury could find that under the circumstances it was objectively unreasonable for the defendant officers to believe that probable cause existed to arrest plaintiff given Nadia's complaint against and identification of plaintiff. Thus defendants are entitled to qualified immunity on plaintiff's false arrest claim (if in fact he is pressing it).

In deciding whether officers are entitled to qualified immunity on a false arrest claim, the court must evaluate the objective reasonableness of the officers' belief that they had probable cause to arrest the plaintiff:

> An arresting officer is entitled to qualified immunity from a claim for unlawful

> arrest if 'either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'

Lennon, 66 F.3d at 423 (quoting Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1996)).

The material facts within the defendant officers' knowledge at the time of plaintiff's de facto arrest are undisputed. First, the defendants were in receipt of a complaint that plaintiff hit the victim with a stick, which was corroborated by the victim's identification of plaintiff as the person who hit her. See Oliveria v. Mayer, 23 F.3d 642, 647 (2d Cir. 1994). Moreover, probable cause is bolstered by plaintiff's admission to Officer Rodriguez, prior to defendants' taking physical custody of him, that he had hit the victim with a stick.

The Court thus finds that the undisputed facts within the defendants' knowledge at the time of plaintiff's arrest

support the conclusion that defendants are entitled to qualified immunity from plaintiff's false arrest claim as a matter of law because it was objectively reasonable for them to believe that they had probable cause to arrest the plaintiff for his admitted assault on Nadia, even if ironically, defendants did not believe they had probable cause. Accordingly, the Court's ruling on defendants' Motion in Limine [doc. #38] is supplemented to grant it on plaintiff's false arrest claim.

IT IS SO ORDERED.

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut: February 05, 1997

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 25th day of November one thousand nine hundred and ninety-seven.

PRESENT: HONORABLE ELLSWORTH
VAN GRAAFEILAND,
HONORABLE RICHARD J. CARDAMONE
HONORABLE JOSEPH M. McLAUGHLIN
Circuit Judges.

DRAMESE FAIR, a minor, by & through his mother & next friend, Sandra Foy,

Plaintiff-Appellee

- v - No. 97-7287

J. VELLECA,

Appellant,

RICHARDO RODRIGUEZ, Individually

Defendant-Appellant.

FOR APPELLANTS: Martin S. Echter, Esq.
c/o Office of the Corporation Counsel
New Haven, CT

FOR APPELLEE: Carroll L. Lucht, The Jerome N. Frank Legal Services Organization, Yale Law School, New Haven, CT (M. Ahadi Bugg, Stephen Rich and Daniel C. Lewis, Student Legal Interns, Yale Law School, on the brief).

Appeal from the United States District Court for the District of Connecticut (Arterton, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the appeal is DISMISSED.

In 1996 plaintiff Dramese Fair, an eleven-year-old-boy, was living with his mother, Sandra Foy, and his younger sister in New Haven, Connecticut. In June 1996, an altercation occurred between several youths near Dramese's home. Nadia, a girl involved in the altercation, struck Dramese's sister, who told Foy about the incident.

Foy and Dramese found Nadia at a neighborhood church with her mother. During the ensuing conversation, Foy struck Nadia. Dramese then hit Nadia on the back and on her leg with a stick he was carrying. Nadia was not seriously hurt. Nadia's mother called the New Haven Police Department.

Foy took Dramese home, then left, leaving Dramese with an adult friend. Officer Richardo Rodriguez, with officer John Velleca, drove to Dramese's house, with Nadia in the car.

When the officers arrived, Dramese was sitting on the front porch, holding a stick in his hand. Nadia identified Dramese as the boy who struck her with a stick. After the officers asked Dramese where his mother was (he did not know), Dramese admitted that he had struck Nadia. The officers took the stick and put Dramese in the back seat of the cruiser. For reasons in dispute, Dramese was subsequently handcuffed. Confused and worried, he began to cry.

In January 1994, Dramese, though Foy, sued the officers in the United States District Court for the District of Connecticut under 42 U.S.C. § 1983 for violation of his constitutional rights (Arterton, J.). Dramese alleged that he was subjected to false arrest and excessive force.

In November 1996, the officers filed a "Motion in Limine" in "anticipation of our argument at the close of the plaintiff's case that the defense is entitled to a directed verdict." The officers asked the court to treat the motion as a

motion for summary judgment "[i]f, after full briefing, the Court agrees with our analysis."

In February 1997, treating the motion in limine as a summary judgment motion, the district court granted the officers' motion on the false arrest claim but denied their motion for qualified immunity on the excessive force claim. In its opinion addressing the officers' motion for reconsideration, the court elaborated:

> [M]aterial facts here are disputed: whether the underlying offense was violent or not, plaintiff's conduct prior to, during and after being placed into the police cruiser, the existence of any fight or flight manifestation by plaintiff at anytime, or any attempted escape assistance by the children . . . and plaintiff's conduct while inside the cruiser claimed to require the placement of handcuffs on him.
>
> . . .
>
> [T]he Court concludes that plaintiff's pre-adolescent age, small size, claimed lack of sophistication and

> guilelessness, and increased vulnerability to emotional trauma by virtue of his youth, are all factors which must be considered as part of the totality of the circumstances facing the officers at the time.

(Quotations omitted).

The officers appeal, contending that the district court erred in denying their motion for summary judgment for qualified immunity.

Immediate appeal is not permitted if the district court's denial of summary judgment for qualified immunity rests on a finding that there were material facts in dispute. See Johnson v. Jones, 115 S. Ct. 2151, 2159 (1995); Genas v. State of N.Y. Dep't of Correctional Servs., 75 F.3d 825, 830 (2d Cir. 1996). In the qualified-immunity context, "when a district judge finds that a factual disputed exists, which is sufficiently material to take a case to the jury, an appellate court should not review even the legal issue of whether this finding of a factual dispute was correct." Genas

75 F.3d at 830 (citing Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995)).

The district court concluded that "material facts here are disputed," precluding the court from granting the officers' motion for summary judgment for qualified immunity. The court noted that "whether it was reasonable for these officers to believe their actions did not violate plaintiff's clearly established rights depends here on whether one believes their version of the facts. That version is sharply disputed, and the matter of the officers' qualified immunity therefore cannot be resolved as a matter of law." Accordingly, we lack jurisdiction to review the officers' appeal.

We have considered all of the officers' other arguments and find them to be without merit.

Accordingly, the appeal is DISMISSED.

For the Court
George Lange, III, Clerk

by:[Signature of Lucille Carr]

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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

RICHARDO RODRIGUEZ , et.al.,

Petitioners,

-VS-

DRAMESE FAIR, a minor, by and through his mother and next friend, Sandra Foy,

Respondent.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Procedural history

Respondent, Dramese Fair, an eleven year-old boy, suffered serious psychological harm as a result of the unconstitutional actions and excessive force of the petitioner police officers. Respondent sued. The district court properly denied petitioner's motion to dismiss on grounds of qualified immunity. The court found that material facts existed as to whether the police officers violated the respondent's Fourth Amendment rights. Petitioners then appealed this ruling to the Second Circuit Court of Appeals. In a Summary Order, the Court of Appeals dismissed the appeal for lack of jurisdiction. It held the petitioners could not appeal the district court's denial of summary judgment because its decision regarding qualified immunity was premised on the finding that material facts remained in dispute.

B. Facts of the incident in question

On June 13, 1993, the day of the incident, respondent Dramese Fair lived with his mother, Sandra Foy, and his nine year-old sister in the South Street Housing Project in New Haven, Connecticut. On that day, respondent's younger sister ran into the apartment crying about an injury she had sustained from a neighborhood scuffle. (March 22, 1994, Dep. Dramese Fair). Nadia, a neighborhood girl, had hurled and struck the respondent's sister with a rock aimed at her forehead. Upon seeing her daughter's injury, Ms. Foy immediately left the house to locate Nadia and her mother who were attending a local church. Dramese followed his mother. When Ms. Foy located Nadia and her mother, she attempted to discuss the young girl's actions against her daughter. During the ensuing conversation, Ms. Foy perceived Nadia as insolent and struck her on the neck. Dramese then hit Nadia on her back and leg with the stick he was carrying. Nadia did not cry or sustain injury. However, she and her mother filed a complaint at the New Haven Police Department. (May 22, 1994, Dep. Richardo Rodriguez). Following the minor incident with Nadia and her mother, Ms. Foy returned home with her son. She then left to attend church. Dramese remained at home with an adult caretaker named Tracy Daniels. (March 22, 1994, Dep.

Dramese Fair). While Ms. Daniels remained inside, Dramese sat on the outside steps in his pajamas, without shoes, and began to hit the railing with the stick. (March 22, 1994, Dep. Dramese Fair).

In response to the initial complaint filed at the police department, Officer Richardo Rodriguez requested backup from Officer John Velleca and proceeded to the South Street Housing Project. (May 22, 1994, Dep. Richardo Rodriguez). Officer Velleca followed Officer Rodriguez in a separate police vehicle. During this time, Nadia sat in the passenger seat of Officer Rodriguez's car. When the officers and Nadia arrived at the housing project, Dramese sat on the front porch of his apartment, wearing pajamas and socks. He was making "zorro" signs in the air and swinging the stick against the railing. (October 19, 1994, Video Tape Dep. Dramese Fair; May 22, 1994, Dep. Richardo Rodriguez). Nadia then identified Dramese as the boy who struck her with the stick earlier that morning. (May 22, 1994, Dep. Richardo Rodriguez).

Initially, Officer Rodriguez exited the vehicle and confiscated the young boy's stick. (May 2, 1994, Dep. John Velleca). Then, both officers asked Dramese where his mother was. Dramese responded by saying that he did not know. The officers then asked Dramese for his name and for the name of the person watching him. (March 22, 1994, Dep. Dramese Fair). Dramese replied that he did not know. The police officer also asked him if he knew why the police came to his home. He responded affirmatively to hitting Nadia with a stick. (October 19, 1994, Video Tape Dep. Dramese Fair). Officer Velleca then placed Dramese in the back of Officer Rodriguez's police car. (May 2, 1994, Dep. John Velleca). Officer Velleca remained beside the police cruiser. Children ages three, five and ten who were playing in a nearby field also observed the police and their actions.

Once locked in the back of the police cruiser, Dramese was unarmed, subdued, and unable to escape or to provide resistance. He did not pose a threat to himself or to others. Petitioners did not explain to or discuss with Dramese what was going to happen to him. Later, the petitioners opened the rear door of the cruiser and handcuffed him to prevent him from allegedly "fumbling" through a briefcase. (May 2, 1994, Dep. John Velleca). Consequently, Dramese believed that he was being taken to juvenile detention and

that he would never see his mother again. (October 19, 1994, Video Tape Dep. Dramese Fair). He was terrified and began to cry. (March 22, 1994, Deposition of Dramese Fair).

Following this incident, Tracey Daniels came out of the apartment and spoke to Officer Rodriguez. When the police asked for the location of Dramese's mother, Ms. Daniels replied that she did not know Ms. Foy's whereabouts. Ms. Daniels approached Dramese in the police car and requested the location of his mother. Dramese informed her that his mother had gone to church. (October 19, 1994, Video Tape Dep. Dramese Fair). Ms. Daniels offered to watch the young boy inside the house while the police officers drove to the church. The police declined and elected to take Dramese with them in the police car in order to locate his mother.

On the way to the church, Dramese cried and complained about the tightness of the handcuffs. Officer Rodriguez told him to "shut up" and briefly told him why he was in the police car. (March 22, 1994, Dep. Dramese Fair). At this point, Officer Rodriguez briefly discussed why he removed Dramese from his home. When the police arrived at the church, they quickly located Sandra Foy and brought her outside. Ms. Foy immediately noticed her child crying in the backseat of the police car and demanded to know why the police had handcuffed her son. The police removed the handcuffs. The officers then drove Dramese and his mother to the police substation located at their housing project. (October 19, 1994, Video Tape Dep. Dramese Fair; March 22, 1994, Dep. Dramese Fair) The police charged Ms. Foy with Breach of Peace. They referred both Nadia and Dramese to the Juvenile authorities. However, the charges against both Ms. Foy and Dramese were dismissed.

On January 31, 1994, respondent filed a § 1983 and § 1981 complaint against the petitioners. Since the local time rule for summary judgement had expired, the district court, in its discretion, allowed the petitioners to file a Motion in Limine based on qualified immunity on November 13, 1996, without objection from respondent. In a Margin Order, the district court denied petitioners' Motion in Limine on January 30, 1997. It held:

> The inferences drawn from the facts in the deposition excerpts submitted to the Court, viewed most favorably to the plaintiff, could demonstrate that plaintiff took no evasive or hostile actions, and that no circumstances between the time plaintiff was placed in the police vehicle uncuffed and the time he was handcuffed. Thus, a factual determination is necessary at trial to determine the totality of the circumstances under which the objective reasonableness of the defendant police officers' actions in handcuffing plaintiff must be assessed.

(Margin Order, denying Motion in Limine, dated January 30, 1997).

Petitioners then filed a Motion for Reconsideration on January 31, 1997. In elaborating on the Margin Order, the district court noted that

> . . .[M]aterial facts here are disputed: whether the underlying offense was violent or not, plaintiff's conduct prior to, during and after being placed into the police cruiser, the existence of any fight or flight manifestation by plaintiff at anytime, or any attempted escape assistance by other children outside the cruiser, and plaintiff's conduct while inside the cruiser claimed to require the placement of handcuffs on him.
>
> Taking the inferences most favorable to plaintiff's version in deposition, he was a small, pajama-clad, shoeless [eleven] year-old boy, sitting on the porch of his home, who made no effort to resist or flee from police at any time, and who sat in the cruiser, silent and hands together in his lap, crying after the police entered the cruiser and handcuffed him. . . . [T]he Court concluded that a reasonable trier of fact could find that the defendants' actions were objectively unreasonable. The force used by defendants under the totality of the circumstances

> posited by the plaintiff cannot be said to be objectively reasonable as a matter of law. Thus, plaintiff's claim of deprivation of his constitutional right to be free from excessive force must advance to trial.

(Order denying Motion for Reconsideration, February 5, 1997).

Following this decision, the petitioners appealed to the Second Circuit Court of Appeals and asserted that qualified immunity is appropriate where the undisputed facts fail to prove a violation of clearly established law. In a Summary Order, the Second Circuit dismissed the petitioners' claim for lack of jurisdiction because of the district court's determination that genuine issues of material fact remained in dispute.

REASONS FOR DENYING THE WRIT

1. The Second Circuit correctly held that it did not have jurisdiction to hear petitioners' appeal.

Petitioners contend that their appeal relates to whether the law governing the use of excessive force is clearly established. (Pet. Brief 16). However, this is not the petitioners' real aim. Under the guise of whether the law is clearly established, the petitioners seek to have this Court actually review the merits of the claim, and thus become a trier of fact. Indeed, the Second Circuit decision held that genuine issues of material facts remained in dispute, and thus, this decision is not appealable immediately. Therefore, this Court should not grant certiorari because the petitioners raise issues which do not exist separately from the merits of respondent's claim. The petitioners' case presents claims over which appellate judges enjoy no comparative expertise; it risks delay and is an unwise use of judicial time. Johnson v. Jones, 515 U.S. 304, 313-317 (1995).

The law of excessive force, as discussed infra, is clearly established as a fact-based inquiry into the totality of circumstances surrounding the use of force. Graham v. Connor, 490 U.S. 386 (1989). In this case, petitioners seek a review of the

district court's finding of material facts which directly relate to the determination of clearly established law. Furthermore, petitioners request a review of the merits of respondent's claim, namely, whether the facts as alleged provide evidence of an unreasonable use of force. However, a denial of summary judgement is not immediately appealable in that it rests on a finding that certain material facts are in dispute. Johnson, 515 U.S. at 313-314; Genas v. State of New York Dept. of Correctional Services, 75 F.3d 825, 830 (2d Cir. 1996). First, as the case law cited by petitioners holds, appealability does not turn on the strength of the argument, but the nature of the original order. Behrens v. Pelletier, 516 U.S. 299 (1996). Second, implicit in the brief Summary Order of the Second Circuit is that the law of excessive force is clearly established. The court elected not to review the case law in the Order because it was clearly established.

This Court has held that denials of summary judgment are not appealable immediately because they do not present issues sufficiently separate from the merits of respondent's claim. The district court in this case held that

> [M]aterial facts here are disputed . . . . Taking inferences most favorable to plaintiff . . . he was a small, pajama-clad, shoeless twelve year-old boy, sitting on the porch of his home, who willingly gave police his stick on their request . . . who made no effort to resist or flee from police at any time, and who sat in the cruiser, silent and hands together in his lap, crying after the police entered the cruiser and handcuffed him.

By seeking certiorari on the appealability of a case with material facts in dispute, petitioners essentially have asked this Court to canvass the factual record to determine whether the police officers conduct violated clearly established law. This case does not present the "neat, abstract issue of law" envisioned in Johnson. Johnson, 515 U.S. at 317 (citation omitted).

An immediately appealable denial of qualified immunity is "a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." Id. at

313. Despite assurances otherwise, petitioners appeal the very heart of the excessive force inquiry, namely, whether the force was reasonable. However, "a claim of immunity [should] raise a question that is significantly different from the questions underlying plaintiff's claim on the merits (i.e., in the absence of qualified immunity)." Id. at 314. It is difficult to find a "separate" legal question when it is not "significantly different from the fact-related legal issues that . . . underlie the plaintiff's claims on the merits." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

At best, petitioners' argument on appeal is that the facts in dispute are not material to the excessive force issue. However, the Second Circuit has held that

> [W]hen a district judge finds that a factual dispute exists, which is sufficiently material to take a case to the jury, an appellate court should not review even the legal issue of whether this finding of a factual dispute was correct.

Genas, 75 F.3d at 830 (denials of summary judgment such as whether plaintiff's facts support claim of violation of clearly established law still applicable). As recognized even by the petitioners, when there are disputed issues of material fact which might impact the Court's determination of a claim of qualified immunity, special factual interrogatories may be submitted to the jury. Hunter v. Bryant, 502 U.S. 224 (1991); Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995). (Pet. Brief, 13). These cases emphasize the fact that courts should allow juries to review qualified immunity claims where material facts remain in dispute.

Thus, when trial courts determine that genuine issues of fact are material and sufficient to take the case to trial, appellate courts should not entertain an appeal immediately because trial judges, rather than appellate judges, confront these issues on a daily basis. Johnson, 515 U.S. at 315. Furthermore, immediate appeal of the order in this case is unlikely to "bring important error-correcting benefits." Id. Allowing review at this stage also risks delay because "factual controversies . . . may seem nebulous . . . . Requir[ing] reading a vast pretrial record, with numerous

conflicting affidavits, depositions, and other discovery materials." Id. at 316. Finally, allowing an appeal at this stage "makes unwise use of appellate courts' time by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." Id. at 317. Such a review contradicts goals of judicial efficiency.

2. Qualified immunity does not protect police officers when they unlawfully use excessive force to restrain an eleven year-old child who did not pose a flight or safety risk.

Petitioners argue that the right of an eleven year-old juvenile to remain free from handcuffing during a lawful arrest is not clearly established. (Pet. Brief 25-38). Respondent is not required to present case law holding the specific facts and subsequent actions in question as unlawful. Petitioners also argue that respondent's case asks that the trial judge, the Second Circuit, and this Court change existing and established law. On the contrary, respondent requests that this Court follow the standard set in Graham and does not seek a special right for all juveniles subject to arrest. Petitioners now challenge the district court for having followed the holdings of this Court. In fact, they have asked the Court to ignore current legal precedent and create new law. This Court has long held that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). Petitioners would have the Court create an absolute zone of police discretion with regard to handcuffing. They request, therefore, a rule capable only of mechanical application. The Court should resist this request and adhere to the objective reasonableness standard that preserves the proper balance between the rights of individuals and the legitimate interests of law enforcement.

In order for a plaintiff's claim to survive a defense of qualified immunity, it must allege the violation of a clearly established statutory or constitutional right. See, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This right is clearly

established when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). However, courts do not have to have previously held a particular action as unlawful in order for plaintiffs to prove that an official violated a clearly established law.[1] Id. See also, Finnegan v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990) (refusing to hold that act violates clearly established right only if "factually identical action has been previously held unlawful.").

Courts have ruled consistently that the right to be free from excessive force is clearly established as a general right, requiring that all claims receive adjudication under the objective reasonableness standard set by Graham. See, e.g., Martin v. Heideman, 106 F.3d 1308 (6th Cir. 1997); Soares v. Connecticut, 8 F.3d 917 (2d Cir. 1993). The Graham objective reasonableness standard provides that the trial court must consider the totality of the circumstances when assessing an officer's actions and applied force in a particular instance. Graham, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1968). This totality of circumstances approach includes a court's determination of "the

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1. Indeed, as argued by Linda Ross Meyer, such a mechanical definition would allow defendants to remove all possible claims because of an overgeneralized standard:

> If one takes the view that officers do not have adequate notice of what constitutes reasonable force until a court has articulated the standard in a particular factual setting, the law is indeterminate until a case articulates the standard at an appropriate level of generality, regardless of whether a "reasonable" officer would have thought the force excessive.

Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467, 1516 (1996). See also Kelly v. Borg, 60 F.3d 664, 667 (9th Cir. 1995) (noting that "[t]o . . . define the right at issue more narrowly . . . would be to allow Appellants, and future defendants, to define away all potential claims.").

severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. This approach also requires that the reasonableness of a specific use of force "be judged from the perspective of a reasonable police officer on the scene." Id.

In this case, the district court ruled that disputed material facts exist and if adjudicated favorably for respondent would not entitle petitioners to qualified immunity as a matter of law. These facts include: eleven year-old Dramese was "small" and "pajama-clad" at the time of the arrest; he willingly surrendered the stick with which he had been playing; and he made no effort to resist arrest or to flee from the police cruiser where he sat subdued prior to the handcuffing. After being handcuffed, Dramese remained in the back of the police cruiser. He sat motionless and crying. (Memorandum Endorsement Rule on Defs. Motion for Reconsideration, filed February 6, 1997) Petitioners further admitted that once they initially placed Dramese in the back of the police cruiser, prior to handcuffing, they did not consider Dramese to be a flight safety risk. (March 22, 1994, Dep. Richardo Rodriguez; May 2, 1994, Dep. John Velleca). Nevertheless, they handcuffed him with his hands behind his back. (March 22, 1994, Dep. John Velleca). Finally, the police neither informed him of his rights nor of what would happen to him as the police car drove him away from his home.

Under this set of facts, the district court concluded that the petitioners' actions could be found unreasonable as a matter of law. Consistent with Graham, the district court ruled that "plaintiff's pre-adolescent age, small size, claimed lack of sophistication and guilelessness, and youth, are all factors which must be considered as part of the totality of the circumstances facing the officers at the time." (Memorandum Endorsement, supra.). This ruling by the district court did not make new law, but merely applied the objective reasonableness standard of Graham to the facts of this case.

Petitioners argue that because neither the trial court nor the Second Circuit cited to a case specifically holding that the handcuffing of a child by police officers is either prohibited or constitutionally constrained, this Court should grant certiorari. No

citation, however, is necessary. The respondent in this case does not claim a special right. In Martin v. Heideman, the Sixth Circuit reversed summary judgment for defendant police officers on a claim of "excessively forceful handcuffing" because it concluded that handcuffing claims should be adjudicated under the general rubric of excessive force. Martin, 106 F.3d at 1313. Even though the plaintiff Martin was an adult arrested for fraudulently staging a dangerous car accident and the injuries sustained to his hands due to handcuffing consisted of numbness, the Sixth Circuit refused to grant to the officers an exemption for review of their actions under Graham. The petitioners' argument illuminates their misconception that police enjoy a special right to handcuff except where precedent clearly indicates that it is not appropriate.

Finally, continued reliance upon the objective reasonableness standard places no greater burden on police. Police are currently constrained to weigh the reasonableness of their conduct in terms of the totality of circumstances. This means that since Graham they have been urged to take age and size into account when using force, just as they have been constrained to take other pre-existing conditions such as injury and mental capacity into account. See, e.g., Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994); Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993).

3. There is no per se right to handcuff during the course of an arrest.

Police officers do not enjoy a per se right to handcuffing. The Second Circuit has announced in clear terms that "although handcuffing will be the reasonable course in many, if not most arrest situations, we do not accept the principle that handcuffing is per se reasonable or that Graham v. O'Connor requires such a

conclusion." Soares, 8 F.3d at 921.[2] The Graham standard requires that the determination of whether a particular seizure is reasonable under the Fourth Amendment must proceed by carefully balancing "the nature and the quality of the intrusion on the individual's Fourth Amendment interests" against the opposing government interests. Graham, 490 U.S. at 396 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

In the typical arrest situation, the use of handcuffs may be justified by the legitimate state interest in preventing flight and safety risks even if the suspect makes no actual attempt to flee. Soares, 8 F3d at 922. The instant case presents a different question because the use of handcuffs was not in the "ordinary course of an arrest." Id. Dramese never presented a valid safety risk to two grown, armed police officers, and he was clearly not a flight risk sitting quietly in the back of the police car. The "crowd" of children gathered in a field, ages three, five, and ten, were too young and too far away to pose any serious threat to the officers. (March 22, 1994, Dep. Dramese Fair) Thus, posing no legitimate flight or safety risk, the escalation of force in the form of handcuffs was not justified by any legitimate government interest. It was also unreasonable in light of the totality of circumstances presented to petitioners, including the plaintiff's age and the fact that the alleged crime consisted of a playground scuffle, which petitioners

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2. In Soares, a fisherman was arrested for violating a reporting regulation that required an accurate accounting of whether an individual fished in a certain year. The defendant government official approached Soares, informed him that he was under arrest for violating the pertinent regulation, placed handcuffs on him, and then walked him to the police cruiser and put him in the back seat. Upon arriving at the station, the handcuffs were removed, and Soares's wrists were bruised and slightly indented. The Second Circuit in Soares reversed the district court's denial of summary judgment on the grounds that the right of the adult plaintiff not to be routinely handcuffed during an arrest was not clearly established. Soares at 922. Similarly defendants here argue that Dramese has no clearly established right not to be handcuffed during a routine arrest.

knew did not result in an injury. Further, the officers decided to use handcuffs not because of Dramese's incident with the school girl, but because of an unrelated event – the alleged "fumbling through" a briefcase. (May 2, 1994, Dep. John Velleca)

Petitioners rely on Soares to support their contention that the police have a per se right to handcuffing. The holding in Soares does not support such an overreaching claim. Morevoer, critical factual differences exist, between Soares and the instant case. Soares was an adult, whereas Dramese was an eleven year-old boy. There was no warrant for Dramese's arrest, and, in fact, petitioners did not even inform or consider respondent to be under arrest. (March 22, 1994 Dep. Richardo Rodriguez; May 2, 1994 Dep. John Velleca.) Further, the handcuffs were placed on the plaintiff in Soares before he was detained in the police cruiser and were considered as part of the process of arrest. In this case, however, the police had detained Dramese inside the police cruiser, making the use of handcuffs unrelated to the process of arrest. Unlike the insignificant harm of bruises and indentations alleged in Soares, respondent here claims to have been terrified, and continues to this day to express anxiety and anger toward the police.

Respondents rely upon the law of probable cause to support their contention that the performance of a lawful arrest gives police officers broad and unchecked discretion to handcuff. See, e.g., United States v. Sharpe, 470 U.S. 675, 686-87 (1985) (stating that officers need not use most reasonable alternative in effecting arrest); United States v. Price, 599 F.2d 494, 498-99 (2d Cir. 1979) (stating that where grounds for probable cause are established "the maximum intrusion of custodial arrest is permissible"). However, the officers' probable cause to arrest Dramese is not disputed. Rather, petitioners rely upon the law of probable cause in order to avoid the application of the reasonableness test under Graham. The sanction to arrest with probable cause does not translate into permission to use excessive force to effect that arrest. Such an approach is plainly at odds with Graham.

Finally, petitioners demand that this Court ignore the law governing excessive force and adopt a rule conforming to the exigencies of police practice. The New Haven Police Department both before the alleged incident and since has failed to institute a

policy regulating the conduct of police officers who come into contact with juveniles generally, or specifically, with young children.

4. The police officers' application of force after the child had been subdued was objectively unreasonable and resulted in significant psychological injury due to the child's minority status.

The petitioners incorrectly argue that Dramese's psychological trauma does not constitute an "injury." This Court has recognized that childhood "is a time and condition of life when a person may be most susceptible to influence and to psychological damage." Eddings v. Oklahoma, 455 U.S. 104, 877 (1982). The special needs and capacities of juveniles must be taken into account when determining the reasonableness of the conduct of law enforcement. See Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (noting "when . . . a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad.") Further, in Schall v. Martin,467 U.S. 253 (1984) this Court warned against indiscriminately subjecting juveniles to the same enforcement conduct as adults:

> [T]he impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjugated to preventive detention come to see society at large as hostile and oppressive.

Schall, 467 U.S. at 291.

Following this rationale, lower courts have generally considered minority status to be a factor when evaluating either excessive force claims brought under the Eighth Amendment or when assessing the capacity of juveniles during suppression hearings. See e.g., Hewitt v. Jarrard, 786 F.2d 1080 (11th Cir. 1986) (holding that shoving of inmate considered grounds for claim of excessive force because inmate was juvenile); Bergren v.

City of Milwaukee, 811 F.2d 1139 (7th Cir. 1987) (juvenile status was considered by court when determining whether temporary incarceration without guardians present violated due process rights of juvenile suspect or was otherwise used to manipulate his diminished capacity).

Yet, petitioners continue to voice their concern that having to take the minority status of suspects into account will somehow impair the police's ability to make split-second decisions. It is far easier to discern in an instant, however, whether someone is a small, unarmed, slight eleven year old barefoot boy dressed in his pajamas than whether someone has an injury which might be aggravated by the use of force or whether someone has a mental disability. See e.g., Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994) (court held, in part, that officers should have considered that plaintiff was mildly mentally retarded); Walton, 995 F.2d at 1342 (court considered officers' failure to heed client's repeated claims of diabetes as well as obvious physical symptoms of diabetic distress).

Indeed, Dramese's increased vulnerability to emotional harm as a juvenile should be considered among the totality of circumstances under review in this case. Petitioners had the opportunity to leave Dramese at his home with his adult babysitter while they searched for his mother. Instead, they chose to place him in custody. Once locked in the back of the police cruiser, Dramese was unarmed, subdued, and unable to escape or to provide resistance. He did not pose a threat to himself or to others. Petitioners did not explain to or discuss with Dramese what would happen to him. Consequently, when they opened the rear door of the cruiser and handcuffed him, he believed that he was being taken to juvenile detention and that he would never see his mother again. (October 19, 1994, Video Tape Dep. Dramese Fair) He was terrified and began to cry. (March 22, 1994, Deposition of Dramese Fair) Nonetheless, petitioners persisted in their indifference to his well-being.

In this case, petitioners did not have to allow the scope of force to escalate beyond the amount used to detain Dramese in the police cruiser. In defense of their actions, petitioners have alleged that children gathered around the cruiser and that Dramese "fumbled through" a briefcase in the backseat. Respondent

disputes these allegations, but even assuming their accuracy, petitioners had less intrusive options available to them such as removing the briefcase, dispersing the alleged crowd of young children, or standing closer to the door of the police car. What must remain paramount in consideration of this case are the origins of this situation. It evolved as a result of an older brother hitting a bully with a stick because she struck his sister. It did not represent a heated, hostile or volatile and changing police crisis situation. While any and all police force must serve a legitimate state interest and remain proportional to the circumstances, the force exhibited here was clearly without justification in light of the investigatory purpose. Indeed, the use of handcuffs was excessive. Therefore, it could be argued that petitioners overreacted to this relatively minor incident by handcuffing Dramese either 1) because they falsely assumed that they could do anything to this little boy that they might ordinarily do to an adult; or 2) because they feared that if not handcuffed this "pajama-clad," eleven year-old, who once carried a stick somehow might overwhelm them.

Further, petitioners' argument that respondent's position requires the ambiguous situation in which an "officer must handcuff immediately or forego the opportunity unless circumstances invites frivolous claims based on wholly subjective disputes . . . ." is incorrect. The fact that police officers should exercise care when interacting with juveniles is not only practical but represents part of the police's responsibilities to the communities which they serve and protect. According to the petitioner's argument, the police should use one standard of care for all individuals which they arrest or detain. Police officers would not use <u>any</u> level of discretion when investigating a situation, but would instead respond to all situations with the maximum amount of force permitted. This approach risks forcing all juveniles to see the world as hostile and oppressive. <u>Schall</u>, 467 U.S. at 291. It also risks causing juveniles to lose respect for the police.

CONCLUSION

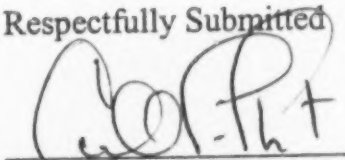
The assertion that the police would adopt one blanket policy towards juveniles is misleading. Indeed, for the level of force used by law enforcement often fails to correspond with the individual child but differs based on perceptions of particular neighborhoods. The petitioners would lead this Court to believe that New Haven Police customarily handcuff young school-age children during minor scuffles and then parade them throughout the neighborhood in pursuit of their mothers. This is simply not the case.

Finally, the correct bright-line under Fourth Amendment law is that when the suspect is fully subdued, no more force may be applied absent a change in circumstances. Allowing one level of intrusion to be justified by probable clause is plainly at odds with the objective reasonableness and totality circumstances approach articulated by this Court. Tennessee v. Garner, 471 U.S. 1 (1985); Graham, 490 U.S. at 396. Thus, if the claim is unclear or frivolous, it can be decided on a motion for summary judgement on the grounds of qualified immunity. However, the claim that there was no change in circumstances is not frivolous, or even ambiguous in this particular case. Dramese remained silent in the back seat of the police car -- weeping.

For the reasons stated above, the petition for certiorari should be denied.

Dated: June 10, 1998

Respectfully Submitted



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